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JAE Consulting & Development and Mudrats Underground Development Construction Company, Inc., Joint Employers and Local 150, International Union Of Operating Engineers. Case 13-CA-34698

August 27, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

Upon a charges filed by the Union, the Acting General Counsel of the National Labor Relations Board issued a complaint on November 25, 1997, against JAE Consulting & Development and Mudrats Underground Development Construction Company, Inc., as joint employers, (herein called Respondent JAE and Respondent Mudrats or collectively, the Respondents), alleging that they have violated Section 8(a)(1) and (3) of the National Labor Relations Act. Respondent JAE filed an answer to the complaint.

Thereafter, on February 14, 1998, the Respondents entered into a settlement agreement which was approved by the Regional Director on April 6, 1998. The settlement agreement provided, *inter alia*, that the Respondents (Charged Parties) would pay a total of \$4,500 to the employee, Jesse Gonzales, involved in this proceeding. The settlement provided that the Respondents would be jointly and severally liable for the total amount, and that each of the Respondents would pay \$2,250 in two equal installments, with the first payment of \$1,125 due from each Respondent by April 10, 1998, and the second payment of the same amount due from each Respondent on June 10, 1998. The settlement further provided as follows:

The Charged Parties agree that in case of noncompliance with any of the terms of this Settlement Agreement by the Charged Party, including but not limited to, failure to make timely installment payment of monies as set forth above, and after 15 days notice from the Regional Director of the National Labor Relations Board, on motion for summary judgment by the General Counsel, the Answer of the Charged Party, if applicable, shall be considered withdrawn. Thereupon, the Board shall issue an Order requiring the Charged Parties to Show Cause why said Motion of General Counsel should not be granted. The Board may then, without necessity of trial, or any other proceeding, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Parties, on all issues raised by the pleadings. The Board may then issue an Order providing full remedy for the violations so

found as is customary to remedy such violations, including but not limited to the provisions of this Settlement Agreement. The parties further agree that a Board order and U.S. Court of Appeals Judgment may be entered hereon *ex parte*.

By letters dated April 29 and May 5, 1998, the Respondents were requested by the Compliance Officer to comply with the terms of the settlement agreement by remitting payment to the discriminatee that had been due on April 10, 1998. The letters further stated that if the Region did not receive the payment by May 13, 1998, a collection action would commence against the Respondents with the filing of a motion for summary judgment. Nevertheless, since entering into the settlement, Respondent Mudrats has failed to make any of the required payments and Respondent JAE has submitted only one payment on May 23, 1998, in the amount of \$1,125, and has failed to make any subsequent payments.

On July 31, 1998, the Acting General Counsel filed the instant motions for summary judgment with the Board.¹ On August 4, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motions should not be granted. The Respondents filed no response. The allegations in the motions are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motions for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted.

Here, according to the uncontroverted allegations in the Motions for Summary Judgment, although Respondent JAE initially submitted an answer to the complaint, the Respondents subsequently entered into a settlement agreement which provided for the withdrawal of the answer in the event of noncompliance with the settlement agreement, and such noncompliance has occurred. We therefore find that the Respondents' answer has been withdrawn by the terms of the April 6, 1998 settlement agreement, and that, as further provided in that settlement agreement, all the allegations of the complaint are true.²

Accordingly, we grant the Acting General Counsel's Motions for Summary Judgment.

On the entire record, the Board makes the following

¹ A separate motion was filed with respect to each of the two Respondents.

² See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent JAE has been owned by Jeff Flippo, a sole proprietorship, doing business as JAE Consulting & Development, with an office and place of business in Bloomingdale, Illinois, and has engaged in the business of construction work. During the 12-month period ending December 31, 1996, Respondent JAE, in conducting its business operations described above, purchased and received goods and materials valued in excess of \$50,000 directly from points located outside the State of Illinois.

At all material times, Respondent Mudrats, an unincorporated construction company owned by Doug Thomas, with an office and place of business in Glen Ellyn, Illinois, has been engaged in the construction business. During the 12-month period ending December 31, 1996, Respondent Mudrats, in conducting its business operations described above, purchased and received goods and materials valued in excess of \$50,000 directly from points located outside the State of Illinois.

At all material times, Respondent JAE has administered a common labor policy with Respondent Mudrats for the employees of Respondent Mudrats.

At all material times, Respondent JAE and Respondent Mudrats have been joint employers of employees of Respondent Mudrats.

We find that Respondent JAE and Respondent Mudrats are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 150, International Union of Operating Engineers is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On various occasions beginning around mid-July, 1996, and continuing through August, 1996, Respondents, at various jobsites, threatened to fire Jesse Gonzales if he continued to raise questions about his paycheck and the number of work hours that the Respondents were reporting to the Union.

Sometime during August, 1996, the Respondents threatened to terminate Jesse Gonzales if he did not falsify information to the Union concerning his overtime work and whether Jeff Flippo had operated machinery on the jobsite.

About November 1, 1996, the Respondents, at the jobsite located in LaGrange, Illinois, discharged their employee Jesse Gonzales, and since that date have failed and refused to reinstate him to his former position of employment, or if that position no longer exists, to a substantially equivalent position of employment.

The Respondents engaged in the conduct described above in order to discourage Jesse Gonzales and other employees from engaging in Union activities.

CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondents have been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and have been discriminating against employees in regard to the hire or tenure or terms and conditions of employment, thereby discouraging membership in a labor organization, and have thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondents have violated Section 8(a)(3) and (1) by discharging and refusing to reinstate Jesse Gonzales, we shall order the Respondents to offer the discriminatee full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondents shall also be required to expunge from their files any and all references to the unlawful discharge, and to notify the discriminatee in writing that this has been done.

ORDER

The National Labor Relations Board orders that the Respondents, JAE Consulting & Development and Mudrats Underground Development Construction Company, Inc., Joint Employers, Bloomingdale and Glen Ellyn, Illinois, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to fire employees if they continue to raise questions about their paychecks and the number of work hours that the Respondents were reporting to Local 150, International Union of Operating Engineers.

(b) Threatening to terminate employees if they did not falsify information to the Union concerning their overtime work and whether the Respondents' agent had operated machinery on the jobsite.

(c) Discharging, failing and refusing to reinstate or otherwise discriminating against employees because they engage in union or other protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jesse Gonzales full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Jesse Gonzales whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, expunge from their files any and all references to the unlawful discharge of Jesse Gonzales, and, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at their facilities in Bloomingdale and Glen Ellyn, Illinois, copies of the attached notice marked "Appendix".³ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since mid-July 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. August 27, 1998

Sarah M. Fox,	Member
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Wilma B. Liebman,	Member
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J. Robert Brame III,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to fire employees if they continue to raise questions about their paychecks and the number of work hours that we were reporting to Local 150, International Union of Operating Engineers.

WE WILL NOT threaten to terminate employees if they do not falsify information to the Union concerning their overtime work and whether our agent had operated machinery on the jobsite.

WE WILL NOT discharge, fail and refuse to reinstate or otherwise discriminate against employees because they engage in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jesse Gonzales full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jesse Gonzales whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL, within 14 days from the date of the Board's Order, expunge from our files any and all references to the unlawful discharge of Jesse Gonzales, and, WE WILL

³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

JAE CONSULTING & DEVELOPMENT AND
MUDRATS UNDERGROUND DEVELOPMENT
CONSTRUCTION COMPANY, INC., JOINT
EMPLOYERS